65 MILLION "NEED NOT APPLY"

The Case for Reforming Criminal Background Checks for Employment

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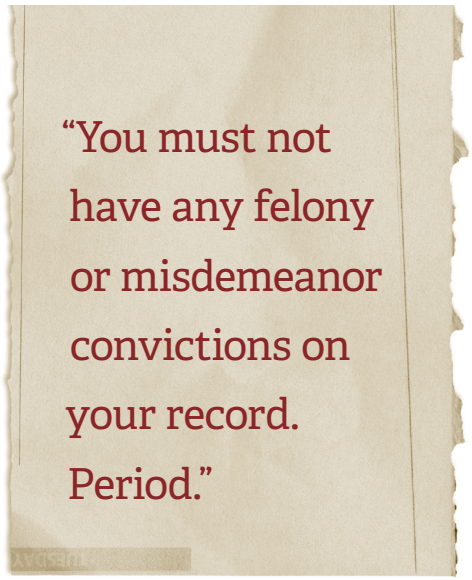
1 Introduction

In recent years, the criminal background check industry has grown exponentially. Particularly in the wake of 9/11, the ready availability of inexpensive commercial background checks has made them a popular employee screening tool. In one survey, more than 90 percent of companies reported using criminal background checks for their hiring decisions.[1] At the same time that the background check industry has expanded, the share of the U.S. population with criminal records has soared to over one in four adults.

In the right situations, criminal background checks promote safety and security at the workplace. However, imposing a background check that denies *any* type of employment for people with criminal records is not only unreasonable, but it can also be illegal under civil rights laws. Employers that adopt these and other blanket exclusions fail to take into account critical information, including the nature of an offense, the age of the offense, or even its relationship to the job.



Yet, as this report documents, based on a survey of online job ads posted on Craigslist, major companies as well as smaller employers routinely deny people with criminal records any opportunity to establish their job qualifications. For any number of entry-level jobs, ranging from warehouse workers to delivery drivers to sales clerks, employers and staffing agencies post these and other job ads that unambiguously close the doors on applicants with criminal records:

> **"No Exceptions! . . . No Misdemeanors and/or Felonies of any type ever in background,"**

> ***"DO NOT APPLY WITH ANY MISDEMEANORS / FELONIES"***

> **"You must not have any felony or misdemeanor convictions on your record. Period."**

Even some of the nation's largest companies have imposed overbroad background check requirements, including Bank of

America (283,000 employees worldwide), Aramark (250,000 employees worldwide), Lowe's (approximately 238,000 employees), Accenture (180,000 employees), Domino's Pizza (170,000 employees worldwide), Adecco USA (70,000 staff on assignment), Burlington Northern Santa Fe Railroad Co. (BNSF) (38,000 employees, not including contractors working on its railroad facilities), RadioShack (35,000 employees), and Omni Hotel (11,000 employees in North America).

Across the nation there is a consistent theme: people with criminal records "need not apply" for available jobs. Combine today's tight job market, the upsurge in background checks, and the growing number of people with criminal records, and the results are untenable. In the end, workers are not the only ones who suffer. Employers are also disadvantaged as blanket hiring restrictions undermine the integrity of criminal background checks and artificially limit the employers' pool of qualified candidates.

While this report explores the exclusion of people with criminal records from work, which severely impacts communities of color, it also reveals a promising shift in policy and practice. Indeed, this is an opportune moment to capitalize on a recent wave of impact litigation and model state and local reforms to develop fairer and more accurate criminal background checks for employment.

If adopted, the following reforms featured in this report would significantly advance the employment rights of people with criminal records and promote safety and security at the workplace:

- The federal government should aggressively enforce civil rights and consumer protections that apply to criminal background checks for employment in the public and private sectors.
- The federal government should adopt fair hiring policies regulating federal employment and contracting that serve as a model for all employers.
- State and local governments should certify that their hiring policies fully comply with federal civil rights standards and launch employer outreach and education campaigns.
- The employer community, together with Craigslist, should play a leadership role in raising the profile of this critical issue and promoting best practices that properly balance the mutual interest of workers and employers in fairer and more accurate criminal background checks for employment.

2 Shutting Workers with Criminal Records Out of the Job Market Compromises the Economy and Public Safety

American workers are treading water in the worst labor market since the Great Depression. To keep afloat, U.S. workers need strong policies and protections to support their ability to find work—their lifeline to economic and social stability. Yet an estimated 65 million U.S. adults who have criminal records often confront barriers that prevent even the most qualified from securing employment.[2]

For many companies, criminal background checks are a means to determine the safety and security risk a prospective or current employee poses on the job.[3] Yet even the assumption that the existence of a criminal record accurately predicts negative work behavior is subject to some debate; one limited study questions whether the two are, in fact, empirically related.[4] The irony is that employers' attempts to safeguard the workplace are not only barring many people who pose little to no risk,[5] but they also are compromising public safety. As studies have shown, providing individuals the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety.[6]

Not only is it a matter of public safety to ensure that all workers have job opportunities, but it is also critical for the struggling economy. No healthy economy can sustain such a large and growing population of unemployable workers, especially in those communities already hard hit by joblessness. Indeed, the impact on the economy is staggering. The cost of corrections at each level of government has increased 660 percent from 1982 to 2006, consuming $68 billion a year,[7] and the reduced output of goods and services of people with felonies and prison records is estimated at between $57 and $65 billion in losses.[8]

Sixty-five million U.S. adults, over one in four adults, have a criminal record.

Johnny Magee | Livermore, California

Garden Center Attendant at Lowe's

In September 1999, 40-year-old Johnny Magee, who is developmentally disabled, picked up a package for his uncle that, unknown to him, contained drugs. Johnny was arrested and convicted of misdemeanor conspiracy to commit a drug offense. He had never used drugs and has never been convicted of any other offense. Johnny held a landscaping job at the Lawrence Livermore National Laboratory for six years until budget cuts forced him to look for a new job in 2008. He applied to Lowe's Home Improvement store in Dublin, California, for a garden center attendant position. Despite his related prior work experience, Lowe's refused to hire Johnny because of his conviction. "Lowe's policy is unfair to me and lots of other good people," said Johnny. "It's unfair because they only see something that happened to me many years ago, even though I've never been in trouble since." Later in 2008, Johnny petitioned the court for a dismissal of his conviction. It was granted and his "finding of guilt . . . [was] set aside."[107] In 2009, Johnny filed Title VII charges with the EEOC against Lowe's.[108]

The concurrent losses to the individual are devastating. A person's interaction with the criminal justice system extends beyond what may be a minor arrest or conviction to a lifetime of social and economic disadvantage. One prominent researcher has found that a criminal record reduces the likelihood of a job callback or offer by nearly 50 percent, an effect even more pronounced for African American men than for white men.[9] Not surprisingly, the U.S. Equal Employment Opportunity Commission (EEOC) has recognized that employer reliance on proxies for race—such as having a criminal record—is "an important civil rights issue."[10]

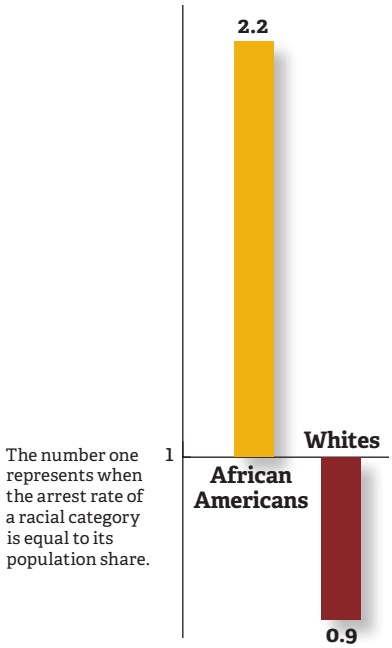
Although greatly impacted by arrest and conviction records, people of color are not the only ones burdened with the indelible mark of a criminal record. The reality that over one in four U.S. adults has a criminal record brings this issue and its public safety and economic consequences to the doorstep of every home in America. As U.S. Secretary of Labor Hilda L. Solis recently stated, "Stable employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole."[11]

3 Overbroad Hiring Restrictions Run Afoul of Federal Laws Regulating Criminal Background Checks for Employment

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, gender, national origin, and other protected categories.[12] Enforced by the EEOC, Title VII has long been recognized as prohibiting not only overt, intentional discrimination, but also disallowing those facially neutral policies and practices that have a disproportionate impact on certain groups. Using arrest and conviction records to screen for employment is an example of the kind of "neutral" selection criteria that invites Title VII scrutiny.

The EEOC's policy guidance on conviction records, issued in 1987, recognized that barring people from employment based on their criminal records disproportionately excludes African Americans and Latinos because they are overrepresented in the criminal justice system.[13] For example, African Americans account for 28.3 percent of all arrests in the United States,[14] although they represent just 12.9 percent of the population; that arrest rate is more than double their share of the population.[15] In contrast, the arrest rate for whites actually falls below their share.[16]

Screening out job applicants with criminal records thus excludes a much larger share of African American candidates. Hence, as the EEOC guidance makes clear, such a policy has a "disparate impact" on African Americans (and Latinos). The disparate impact approach ensures that practices that appear to be "race-neutral" on their face—such as no-hire policies against people with criminal records—are prohibited. Just as it is unlawful and immoral to refuse to hire someone because of skin color, it is also a violation of Title VII for an employer to use non-job-related selection criteria that have the effect of differentiating along racial lines.



The share of African Americans arrested is 2.2 times their portion of the population, while the percentage of whites arrested falls below their corresponding population share.

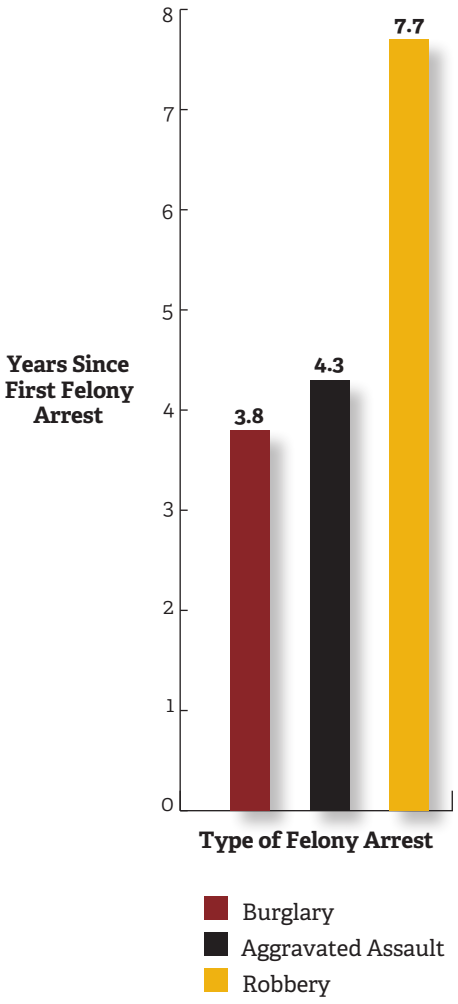
Definitively establishing when criminal background checks for employment cross the line, the EEOC has stated that "an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII."[17] Thus, blanket hiring prohibitions of the type documented in this report violate this fundamental mandate. Yet Title VII does not wholly bar the use of criminal records in employment decisions. Instead, the EEOC has provided a strong and clear framework for assessing criminal records when making an employment decision. An employer's consideration of criminal records may pass muster under Title VII if an individualized assessment is made taking into account:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.[18]

The EEOC's case-by-case approach ensures that people with criminal records are not barred from employment for youthful indiscretions, minor run-ins with the law, or more serious offenses from the distant past. Although the EEOC developed this framework more than 20 years ago, subsequent research has underscored its wisdom.

Buttressing one of the core EEOC factors regulating the use of criminal background checks, research indicates that lifetime employment bans on people with criminal records are not correlated to risk. For example, a major study of people with felony convictions found that 18-year-olds arrested for burglary had the same risk of being arrested as same-aged individuals with no record after 3.8 years had passed since the first arrest (for aggravated assault it was 4.3 years, and for robbery it was 7.7 years).[19] If the individual was arrested initially for robbery at age 20 instead of at age 18, then it takes the person three fewer years to have the same arrest rate as a non-offender.[20] Notably, those individuals convicted of property crimes are especially likely to stay clear of the criminal justice system compared to other offenders.

This groundbreaking research has major implications for how employers evaluate the criminal records of workers. Professor Alfred Blumstein, one of the nation's leading criminologists, and his colleague Kiminori Nakamura, conclude that within a narrow period of time, an individual's "criminal record empirically may be shown to be irrelevant as a factor in a hiring decision."[21] Furthermore, these studies evaluate



A major study found that 18-year-olds who were arrested had the same risk of being arrested as someone with no record after 3.8 years had passed since a burglary arrest, 4.3 years for aggravated assault, and 7.7 years for robbery.

the risk of committing an offense without distinguishing whether it took place on the job or if it was job-related. The probability of committing an offense at the workplace, which is a significantly smaller subset of offenses, would likely be even more remote.

A criminal record alone is an inadequate measure of an individual's risk of creating a safety or security threat for other reasons as well. A record may include a wide swath of misleading information; not only is a criminal record difficult to interpret, it may include arrests that were dropped because of factual innocence. Even worse, commercially prepared background checks have been found to be rife with inaccuracies.[22] FBI background checks, which one would expect to have a higher level of accuracy, are shockingly out of date 50 percent of the time, thus routinely failing to reflect whether an arrest actually led to a conviction.[23] The bottom line is that a criminal record can be a blunt, misleading tool to determine whether a worker poses a risk on the job.

Illegality and inaccuracy aside, the consequences to job seekers when employers refuse to hire most people with criminal records cannot be overstated. As the former acting chair of the EEOC explained:

> Fears, myths and such stereotypes and biases against those with criminal records continue to be part of the . . . decision making for many employers. Business and industry suffers as a result because it is not able to benefit fully from the skills of every potential worker. For our economy to be successful, we cannot afford to waste any available talent.[24]

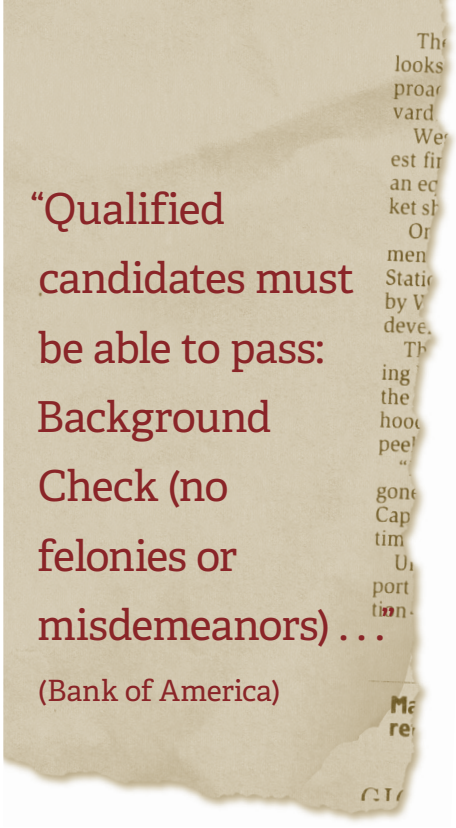
"an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII."
(EEOC)

4 Wave of Lawsuits Documents Routine Civil Rights and Consumer Protection Violations

After years of dormancy, the basic civil rights and consumer protection laws restricting the use of criminal records are catching a second wind. In just the past few years, private lawyers, public interest and civil rights groups, and government agencies have initiated lawsuits challenging exclusionary practices. Reflecting a trend that is expected to continue, at least five major civil rights lawsuits against large employers were filed in 2010 alone.

The lawsuits include *Arroyo v. Accenture*, which alleges that Accenture "rejects job applicants and terminates employees with criminal records, even where the criminal history . . . has no bearing on the . . . fitness or ability to perform the job."[25] Accenture, a global business and technology consulting company, has more than 180,000 employees in the United States[26] and netted $21.55 billion last year.[27] Another major federal lawsuit, *Hudson v. First Transit, Inc.*, charges that First Transit, one of the nation's largest transit service providers with 15,500 employees, has a blanket policy prohibiting individuals from working for the company if they have been convicted of a felony or served so much as a day in jail.[28]

In *Mays v. Burlington Northern Santa Fe Railroad Co. (BNSF)*, BNSF was sued over its "blanket policy prohibiting any person with a felony conviction in the previous [seven] years from being employed at its facilities."[29] BNSF, like most major railways, has been using the commercially run e-RAILSAFE program, which provides periodic background checks on the nation's railroad employees.[30] This case also has the potential to impact tens of thousands of workers. BNSF alone has 38,000 employees, not including the contractors working on its railroad facilities.[31]



Private employers are not the only ones coming under fire for their discriminatory policies. In the class action lawsuit *Johnson, et al. v. Locke*,[32] the U.S. Census Bureau was sued under Title VII for discriminating against people with criminal records by excluding them from consideration for temporary positions with the Census.[33] The job applicants' complaint states that "roughly 700,000 people" were eliminated by Census' screening practice, thus "import[ing] acute racial and ethnic disparities in the criminal justice system into the employment process."[34]

The EEOC also has a Title VII criminal records suit pending against the Freeman Companies,[35] a convention and corporate events marketing company accused of rejecting job applicants based on criminal background records and credit histories.[36] In a press release about the lawsuit, the EEOC warned that "[e]mployers . . . should be careful to avoid hiring practices that have unlawful discriminatory effects on workers."[37]

In addition to these recent federal lawsuits, workers across the country have filed numerous charges with the EEOC challenging employers' use of criminal records. Although national data is unavailable from the EEOC, two non-profit organizations—NELP and Community Legal Services of Philadelphia—have filed more than a dozen EEOC charges that are pending against national employers,[38] such as Lowe's (approximately 238,000 employees)[39] and Select Truckers Plus.[40]

The EEOC may also initiate investigations under a special procedure known as a "commissioner's charge." In 2009, NELP and other organizations petitioned the EEOC to file a commissioner's charge against Bank of America, which reported $2.4 trillion in assets and approximately 283,000 employees worldwide,[41] and Manpower, which is one of the nation's largest staffing agencies.[42] The petition called attention to the job announcement circulated by Manpower and Bank of America broadly prohibiting workers with criminal records from applying for 600 clerical positions in 2009.[43] The job announcement distributed by the federally-funded One Stop Career Center in the San Francisco Bay Area stated:

> **"Qualified candidates must be able to pass: Background Check (*no felonies or misdemeanors*) . . ." (emphasis added).**

In 2009, New York Attorney General Andrew Cuomo (now Governor Cuomo) entered the fray by enforcing state protections that regulate criminal background checks for employment.[44] The Office of the Attorney General (OAG) has reached major settlements against three

companies and a private screening firm—agreements that serve as models for background check policies and procedures.

Beginning in November 2008, the OAG investigated the national electronic store chain, RadioShack, and the background check company, ChoicePoint. RadioShack is the second-largest retailer of consumer electronics in the United States, employing approximately 35,000 employees.[45] The OAG found that RadioShack automatically rejected any individual who answered "yes" to the question, "Have you been convicted of a felony in the past 7 years," by not allowing the individual to complete the job application.[46]

ChoicePoint, which accounts for an estimated 20 percent of the U.S. background check industry conducting more than 10 million annually,[47] played an integral role in designing and implementing RadioShack's unlawful practices. It created an online application system that automatically dismissed anyone who self-disclosed a criminal record history.[48] ChoicePoint also conducted background checks for RadioShack that reported sealed and dismissed convictions, in violation of state law.[49]

In another settlement finalized in 2010, the OAG found that ChoicePoint had developed a matrix that rated applicants based on their criminal records for ABM Industries, one of the largest facilities services contractors in the United States with over 90,000 employees nationwide.[50] ABM Industries obtained background checks that reported dismissed charges and infractions, in violation of state law.[51]

In 2009 the OAG also entered into a settlement with Aramark, one of the largest food service providers in the United States with 250,000 employees worldwide.[52] Aramark's job announcement for temporary janitorial and food-service personnel stated:

> **"All Applicants must have a *FULLY clean background* for the past seven (7) years." (emphasis added).**

"All Applicants must have a FULLY clean background for the past seven (7) years."
(Aramark)

The OAG's model settlements with RadioShack, ChoicePoint, ABM Industries, and Aramark are structured for lasting change, including components of policy reform, training of employees, and ongoing independent compliance monitoring.[53]

In addition to this growing list of civil rights lawsuits and EEOC charges, workers have also taken employers and background check companies to court to enforce the Fair Credit Reporting Act (FCRA). FCRA regulates the commercially prepared background reports used by most

Darrell Langdon | Chicago, Illinois

Boiler Room Engineer in Chicago Public Schools

Like many, Darrell Langdon struggled with addiction in his youth. Now 52 and having raised two sons as a single father, Darrell, through his strength of character, has been sober for over twenty years. Although he has moved forward in life through hard-won rehabilitation, his 25-year-old felony conviction for possession of cocaine remains.

Darrell worked as a boiler room fireman in the Chicago Public Schools (CPS) until 1995 and then as a mortgage broker until 2008. After the market crash, Darrell reapplied to CPS to return to his roots as a boiler room engineer, his father's career. With his excellent qualifications, he was hired pending a background check. But the decades-old conviction proved to be the mark against him. Not giving up, he was granted a "certificate of good conduct" by the court. Even with this certificate, which legally lifted the barrier to employment, CPS again rejected him. It took media scrutiny and legal support, but CPS finally reconsidered. Darrell, one of the few lucky ones, now has a job he loves.[109]

private employers that conduct criminal background checks. Under FCRA, if an employer rejects an applicant based on the background report, a copy of it must be provided to the applicant prior to the refusal to hire, which allows the applicant to correct any misinformation.[54] According to one study, employers are routinely violating these fundamental consumer protections.[55]

Mirroring the upsurge in Title VII litigation, a number of FCRA lawsuits have recently been filed. The suits challenge the failure of major screening firms and employers to provide "pre-adverse-action" notices and to ensure accurate reporting.[56] The defendants include HireRight Solutions, an employment screening firm that partners with companies like Monster and Oracle; Prologistix, a staffing firm; and First Transit and First Student, nationwide transit service companies; one such case settled for $20 million in 2008 against LexisNexis.[57] In addition to these lawsuits filed by private parties, the Federal Trade Commission brought FCRA charges against several railroad industry entities, including Quality Terminal Services, LLC and Rail Terminal Services, LLC.[58]

The rise in legal actions highlights both the widespread non-compliance of major companies with federal law, and the growing interest in pursuing legal actions against employers, staffing firms, and background check companies for unlawfully excluding people with criminal records from work.

5 Craigslist Survey Reveals Flagrant Abuses by Nation's Largest Companies

To more systematically document employer non-compliance with Title VII's basic protections, in 2010 NELP surveyed employment ads posted on Craigslist, the widely used online community. Craigslist now operates in over 400 geographic areas in the United States and receives more than one million new job ads a month.[59] The project entailed sorting through thousands of ads posted over four months in five major cities.[60] This substantial pool of job listings represents a slice of the national job market, providing more insight into employer hiring policies and practices as experienced by applicants.

Although employers often remain anonymous on Craigslist (as many no-hire ads were), the survey disclosed that some of the nation's largest employers and staffing firms post ads broadly precluding consideration of individuals with criminal records. Among the more than 300 most problematic ads on Craigslist, which represent the tip of iceberg given the limited scope of the survey, there are several major companies represented. They include Domino's Pizza (170,000 employees worldwide), Omni Hotel (11,000 employees in North America), and Adecco USA (70,000 staff on assignment). Numerous smaller companies also excluded people with criminal records from consideration for advertised jobs.

The following sampling of blanket policies illustrates the range of problematic ads routinely posted by employers on Craigslist. They fall into four categories based on the breadth of the employer's no-hire policy: (1) no arrests/clean or clear records; (2) no felony or misdemeanor convictions; (3) no felony convictions; and (4) no convictions within a specified timeframe.

1) No Arrests/Clean or Clear Records

Employers that post "no arrests" or "clean" or "clear" criminal records ads—the first category in the survey—likely are violating the EEOC

directive that "a blanket exclusion of people with arrest records will almost never withstand scrutiny."[61] Nonetheless, the practice is unexceptional; a 2010 survey of employers indicated that over 30 percent consider an arrest that did not lead to conviction to be at least "somewhat influential" in a decision to withhold a job offer.[62] The following ad embodies one of the more flagrant violations:

> **"* *No arrests or convictions of any kind for the past seven years * No Felony arrests or convictions of any kind for life*," Job ad for Electrician Contractor, Sept. 29, 2010, OMNI Energy Services Corp. (emphasis added).[63]**

According to the EEOC, barring candidates based on arrest records can almost never be justified except in the rare case when the employer "evaluate[s] whether the arrest record reflects the applicant's conduct."[64] "[E]ven where there is no direct evidence that an employer used an arrest record in an employment decision,"[65] an employer who inquires about arrest information without giving the candidate an opportunity to explain the underlying conduct violates Title VII.[66] That's because, as the EEOC acknowledges, "arrests alone are not reliable evidence that a person has actually committed a crime."[67]

"We are looking for people with . . . spotless background/ criminal history."
(CORT Furniture Rental)

Applicant Example: *A highly qualified African American electrician with 30 years' work experience applies for the Electrician Contractor job ad quoted above. He was erroneously arrested 20 years earlier for burglary based on mistaken identity.*

Because the OMNI Energy Services Corporation job ad discourages anyone with a felony arrest "of any kind for life" from even applying, the company would exclude this candidate—despite the fact that this applicant has never actually committed an offense.

Within this category of ads are those with the more ambiguous "clean record" requirement. For example:

> **"We are looking for people with . . . *spotless background/ criminal history*." Job ad for Warehouse worker or Delivery Drivers, Sept. 2, 2010, CORT Furniture Rental (emphasis added).[68]**

A job applicant could easily interpret this employment ad to mean that if she had any arrests, she would not be considered for the job opening. At the very least, this ad has a chilling effect on workers with arrest records and could justifiably trigger an EEOC investigation into the company's hiring practices.

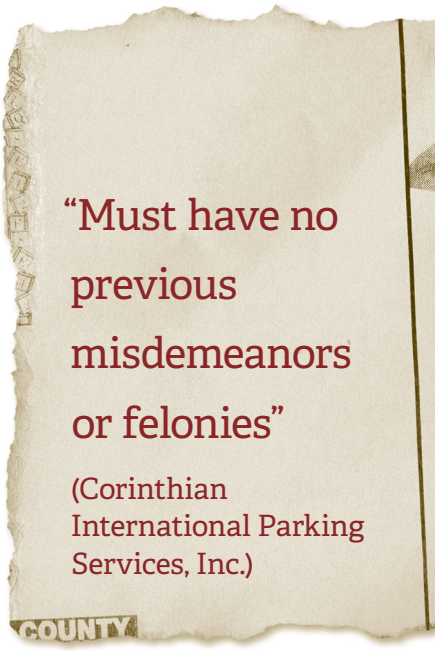
2) No Felony or Misdemeanor Convictions

The Craigslist survey revealed another sweeping category of blanket exclusions of people with criminal records; this time requiring that job applicants have no felony or misdemeanor convictions. As illustrated below, these job ads, including one by a FedEx Ground contractor, broadly exclude any applicant with any type of conviction over the individual's lifetime, regardless of the relationship of the conviction to the particular job.

> "IN ORDER TO QUALIFY AS A DRIVER FOR FEDEX, YOU MUST HAVE THE FOLLOWING:
>
> . . . Clean criminal record, ***no misdemeanors, no felonies***," Job ad for Diesel Mechanic, Delivery Driver, Sept. 24, 2010, Contractor for FedEx Ground (emphasis added).[69]

> "Must have ***no previous misdemeanors or felonies***" Job ad for Valet Attendant, May 12, 2010, Corinthian International Parking Services Inc. (emphasis added).[70]

> "*** ***DO NOT APPLY WITH ANY MISDEMEANORS / FELONIES*** ***" Job ad for Sewer Selling Technician, Feb. 10, 2010, Luskin-Clark Service Company (emphasis added).[71]



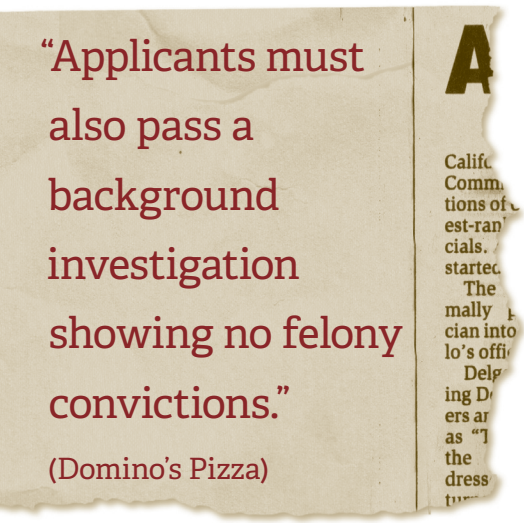
Applicant Example: *A highly qualified applicant was arrested five years earlier because she did not report her income when she was receiving unemployment benefits. Her husband had just died and she was struggling to feed her three young children. She agreed after her misdemeanor unemployment benefit fraud conviction to repay all monies.*[72]

Each of these companies would be in violation of Title VII for their rejection of this qualified candidate solely based on her isolated conviction. The commission of fraud in the unemployment system is completely unrelated to the job duties of a mechanic, a forklift operator, a valet attendant, or sewer selling technician, nor is the offense recent, repeated or sufficiently severe to pose a safety or security threat at the workplace.

3) No Felony Convictions

A subset of the prior category of job ads posted on Craigslist is the exclusion of any applicant with a felony conviction, regardless of when the offense took place, the type of felony, or the nature of the job and its relationship to the crime. Ads exemplifying this exclusion included:

> "Applicants must also pass a background investigation showing ***no felony convictions***." Job ad for Delivery Driver, Jan. 28, 2010, Domino's Pizza (emphasis added)[73]



"Must have ***no felony convictions***" Job ad for Part-time Valet Attendant, April 21, 2010, Omni Hotel (emphasis added).[74]

"***No felony convictions*** on a criminal background check . . . ." Small Engine Technician, Feb. 4, 2010, Altaquip (emphasis added).[75]

Applicant Example: *A qualified, motivated job applicant has a drug possession conviction from 30 years ago. As a young man, he made the mistake of holding drugs for a friend. Learning from the mistake, he distanced himself from negative influences. He paid all his fines and penalties, has an extensive positive work record, and his conviction history is spotless other than his sole conviction.*

The applicant in the example would be rejected from any of the jobs posted above on Craigslist. Never mind that the conviction was decades old and the worker had rehabilitated himself. The employers highlighted here would ignore these facts, thus underscoring the unreasonableness of lifetime bans—they never allow an individual to overcome his mistake nor do they recognize or encourage the worker's rehabilitation.

4) No Convictions Within a Specified Timeframe

A final category of ads routinely posted on Craigslist limits exclusions to convictions within a specific, albeit protracted timeframe. While less restrictive than a lifetime ban, even these more limited exclusions can be problematic. The ads' specified time period may be excessive, and they fail to address the relationship between the offense and job. The following advertisement exemplifies this type of exclusion:

"*Be able to pass a ***7 year criminal background check (no felonies, no misdemeanors)***" Job ad for Forklift Operator, Sept. 8, 2010, Adecco USA (70,000 employees in the United States, emphasis added).[76]

An absolute ban of applicants with convictions during the last seven years violates Title VII. For example, a job candidate with an isolated shoplifting or vandalism conviction from five years ago does not have a record that reflects on her ability to safely and effectively operate a forklift as required for this job. Nor is a five- or six-year-old conviction sufficiently recent in all cases to pose a security threat on the job.

Indeed, the leading research on the recurrence of crime conclusively repudiates this approach. As discussed above, even those individuals

convicted of a *felony* property offense are not likely to reoffend if they have not had any contact with the criminal justice system in the past 3.8 years.[77] Thus, a seven-year age limit on disqualifying offenses still poses a substantial barrier that cannot be supported by the weight of the available evidence on the risk of recidivism.

Staffing Firms

The basic mandate of the nation's civil rights protections is not only directed at employers. It also prohibits employee staffing firms from imposing discriminatory policies on behalf of an employer. Both the employer that made the request and the staffing firm that honored it are liable under Title VII for unlawful screening practices.[78] The Craigslist survey uncovered a generous sampling of particularly egregious no-hire ads by staffing firms:

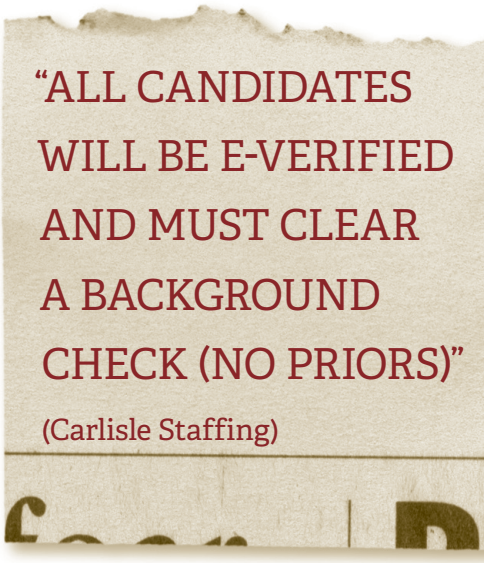
> "Minimum requirements for Employment Consideration, ***No Exceptions!: 1. No Misdemeanors and/or Felonies of any type ever in background***," Job ad for Warehouse and Manufacturing Jobs, Feb. 18, 2010, Perimeter Staffing (staffing firm operating in Atlanta, emphasis added).[79]

> "ALL CANDIDATES WILL BE E-VERIFIED AND MUST CLEAR A BACKGROUND CHECK (***NO PRIORS***)," Job ad for Manufacturing Jobs, Oct. 5, 2010, Carlisle Staffing (staffing firm operating in Chicago area, emphasis added).[80]

> "Candidates must . . . ***Be clear of felony convictions and criminal history*** (background checks will be done)," Job ad for Manufacturing position, Oct. 12, 2010, Abbott Staffing Group (staffing firm operating in southern California, emphasis added).[81]

> "***You must not have any felony or misdemeanor convictions on your record. Period.***" Passenger Van Driver, Feb. 28, 2010, Crown Services Inc. (staffing firm operating in nine states, emphasis added).[82]

> "All candidates must consent to a drug test and criminal background check (***no felonies or misdemeanors allowed***)," Sales Associate, Sept. 28, 2010, Peak Organization (staffing firm operating in New York City, emphasis added).[83]



The Perimeter Staffing, Carlisle Staffing, and Abbott Staffing ads are for manufacturing or warehouse positions that involve little or no contact with the public and thus pose limited risk to public safety. There is no

reasonable justification for banning highly qualified candidates from these jobs who have, for example, non-recent misdemeanor or felony convictions. Nor should the candidates for the driver or sales associate positions be rejected by Crown Services and the Peak Organization based on any number of minor misdemeanors, such as trespassing or loitering.

As the preceding examples illustrate, openly exclusionary no-hire bans are commonplace. That employers and staffing firms continue to post such ads notwithstanding the 20-plus-year-old Title VII guidance issued by the EEOC suggests that even the nation's largest employers are either unaware of civil rights and consumer protections for people with criminal records or are indifferent to them.

Arcadia Murillo | Chicago, Illinois

Janitor in Chicago Police Station

In 1999, Arcadia Murillo was simply in the wrong place at the wrong time. Working as a bartender, she was swept up in a police drug raid and was charged with possession of a controlled substance and refusal to cooperate with police. Luckily, within a month, the truth became apparent: Arcadia had done nothing wrong and the charges were dismissed for lack of probable cause.

In 2006, Arcadia began working for a cleaning services contractor and was assigned as a janitor at a Chicago Police Department station. Early in 2009, a new company, Triad, took over the contact and the City of Chicago performed a criminal background check. When Arcadia's 10-year-old dismissed charges showed up, the City refused to allow Arcadia to work at the police station. No matter that Arcadia had worked hard at the job for over two years. No matter that her arrest was actually dismissed. After losing her job, without even the ability to explain the circumstances to the City, Arcadia filed a lawsuit against the City and Triad for violating state law.[110]

6 Recommendations

While recognizing that criminal background checks fulfill a security function, this report documents the urgent need to protect against arbitrary and discriminatory practices that undermine the integrity of these employment screening procedures. Given the proliferation of criminal background checks, the time has come to implement fairer and more accurate background check policies to balance the demand for employee screening with the basic rights of workers competing for jobs in a struggling economy. The good news is there is already momentum for reform both in the public and private sectors. Building on these advancements, the following measures would serve the interests of qualified workers with a criminal record seeking employment, while also promoting public safety and security at the workplace.

ONE: The federal government should aggressively enforce civil rights and consumer protections that apply to criminal background checks for employment in the public and private sectors. To vigorously enforce both Title VII and FCRA requires a comprehensive, coordinated enforcement strategy on the part of the EEOC, the FTC, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), and other federal enforcement agencies. Significantly, many of the large companies identified in this report have contracted with the federal government for millions of taxpayer dollars in goods and services: Accenture (with a total of $931 million in federal contracts in 2009),[84] Bank of America, Aramark, Addeco USA, Lowe's, OMNI Hotel, Burlington Northern Santa Fe Railroad Co., and RadioShack.[85]

Federal contractors, like all private employers, must comply with Title VII, FCRA, and other basic federal civil rights and consumer protection laws. In addition, they are required to comply with the

federal affirmative action and civil rights mandates set forth in Executive Order 11246, which are enforced by OFCCP. This mandate imposes special obligations on federal contractors to comply with civil rights protections subject to strict penalties, including rescission of the federal contract.[86]

a. Coordinating with the EEOC, the key federal enforcement agencies should prioritize and implement a targeted enforcement strategy. To prioritize this critical and timely issue, the EEOC and OFCCP local offices must effectively identify criminal records cases when they come through the door and thoroughly investigate them. In turn, the local offices must coordinate nationally through the federal enforcement agencies to jointly pool resources and investigate and prosecute the highest-impact cases. To maximize impact, agencies should focus their enforcement activities on the nation's largest employers that maintain broad employment restrictions of the type detailed in this report. Other targets should include the major staffing firms and the private screening companies, which design and implement criminal background checks for most large employers.

b. The EEOC should update the criminal background check guidances while initiating a national education campaign of the employer community that also engages other key federal enforcement agencies. The 20-year-old EEOC guidances provide a thoughtful assessment of the law. However, with the proliferation of background checks in recent years, the guidances should be resituated within today's new realities and challenges. The EEOC should adopt new, robust guidances that reflect the latest empirical research, respond to the current integrated structure of the criminal background check industry, and promote model employer policies and worker protections.

With the support generated by a new EEOC directive, the agency should work with its partners in the federal government to launch an education campaign on criminal background checks for employment targeting both the private and public sectors. To be successful, this outreach and education initiative must also reach down locally (e.g., through the EEOC and OFCCP district offices) to employers large and small and to workers of color hardest hit by the use of criminal background checks for employment.

TWO: The federal government should adopt fair hiring policies regulating federal employment and contracting that serve as a model for all employers. The U.S. Attorney General recently announced a cabinet-level initiative (the Reentry Council) to coordinate "reentry" policies across the federal government. The initiative aims to improve public safety by reducing barriers that undermine opportunities for people with criminal records to be successfully reintegrated into their communities.[87] As a core component of this effort, the federal government should become a model employer of people with criminal records, leading by example to promote hiring in the private sector and among state and local employers.

Chicago Mayor Richard Daley made a compelling case for this approach when he announced the city's highly acclaimed reentry initiative: "We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches."[88] If the federal government adopted model employer policies and required its federal contractors[89] to do the same, 20 percent of the U.S. workforce would be subject to fairer and more accurate criminal background checks for employment.[90]

a. Federal agencies and contractors should certify that their hiring policies fully comply with Title VII. To move toward a model federal policy that applies to the federal workforce and its contractors—including service providers that receive federal funding to help employ people with criminal records—the first step is for each agency to scrutinize its hiring policies and certify that it complies with the EEOC's criminal records guidances.[91] As illustrated by the lawsuit against the U.S. Census Bureau, some federal agencies are neglecting to implement the basic protections of Title VII.[92]

Equally important, each federal agency should ensure that its contractors strictly conform to Title VII. In practice, that means adopting contract language that incorporates the "job-related" and "business necessity" requirements of Title VII. In addition, federal contractors should be required to provide and maintain documentation of their hiring procedures, including their job announcements and "job-related" criteria that apply to criminal background checks for employment. The leadership of the Office of Personnel Management (OPM) in guiding and centralizing these reform efforts will be critical to developing a consistent and effective hiring policy across all agencies.

b. Federal agencies and contractors should adopt model hiring policies that defer the criminal background check until the end of the hiring process. Several federal agencies have adopted policies that reduce barriers to employment for people with criminal records while maintaining public safety.[93] For example, it is not uncommon for federal agencies to wait until the final stages of the hiring process to conduct a criminal background check. This sends the message to applicants that they will be evaluated based on their qualifications for the job, rather than being segregated before they have a fair chance to establish their credentials.

The federal government could also take the next step and adopt the model fair hiring protections in place in six states and thirty cities and counties.[94] These government entities removed from their job applications the question that requires the applicant to report a criminal record.To ensure safety and security on the job, the government employers still conduct criminal background checks in appropriate cases, but not until the final stages of the hiring process. These reforms should be adopted by federal agencies and promoted as best practices for federal contractors by the Office of Management and Budget.

c. Federal agencies and contractors should adopt more transparent procedures to ensure that workers with criminal records can fairly navigate the hiring process. While the federal government hiring process includes certain appeal rights for civil service applicants who are denied employment based on criminal records,[95] a large proportion of the federal workforce is exempted from these protections.[96] In addition, many workers face their toughest challenge when their FBI background checks come back with incomplete information. The workers are unclear of how to dispute the information, yet they must quickly produce corrections, often on very old and minor arrests or convictions, in order for their applications to proceed.[97]

To address these obstacles, federal agencies should adopt the following reforms: notification to rejected workers and implementation of an appeal procedure that will allow workers to promptly challenge background check inaccuracies; and a waiver policy that permits a person with a disqualifying criminal record to produce evidence documenting rehabilitation, strong work history, and absence of risk to safety and security. A model waiver and appeal process was incorporated into the post 9/11 terrorism security laws[98] and was recently implemented by the Transportation Security Administration.

This model process applied to nearly two million port workers and more than one million truck drivers across the United States, which greatly minimized the negative impact of criminal background checks on African American and Latino workers.[99]

Similar procedures should be implemented for the federal workforce and its contractors. Currently, companies that receive federal contracts are not even mandated to provide any specific notice or appeal rights to workers when they are denied employment or removed from their jobs based on criminal background checks.[100] Thus, these workers are often blindsided and are left with no effective remedies to keep their jobs or compete fairly for available job openings.

THREE: State and local governments should certify that their hiring policies fully comply with federal civil rights standards and launch employer outreach and education campaigns. Few state and local governments have recently reviewed the worker protections that apply to criminal background checks for employment, despite the growing impact of background checks on the nation's workforce. As a first step, it is critical that the human resources departments of state and local government entities evaluate their relevant policies and ensure they are in compliance with the EEOC's criminal records guidances and require that their contractors do the same.

a. State and local enforcement agencies should play a leading role in developing a strategic plan to reform employer screening policies. Appropriate state and local enforcement agencies, including the state attorneys general offices and the fair employment and consumer protection agencies, should engage in an active education and impact litigation strategy targeting employers, staffing firms, and the background check companies. As described above, the New York Attorney General's recent enforcement actions offer an impressive model. For example, in the RadioShack settlement, the company agreed to revise its screening policies to provide individualized assessment of convictions and the reason for disqualification to rejected applicants, and to maintain documentation of its hiring processes.[101] In addition, because the nation's largest screening firms account for the vast majority of criminal background checks, states' attorneys general and other appropriate enforcement agencies should engage in joint and coordinated national enforcement actions against these firms with the FTC.

b. State and local governments should adopt model fair hiring policies regulating public and private sector hiring. After incorporating the EEOC's guidances into their hiring processes, local and state governments should adopt the reforms that have been sweeping the country.[102] As described above, this may include removing the job application question regarding criminal history and delaying the background check until the final hiring stage. To promote model policies in the private sector, several cities have also required employers that receive government contracts to adopt the same fair hiring practices.[103] Some states have taken the critical next step of requiring all private sector employers to adopt specific fair hiring policies.[104] For example, in Massachusetts, all employers with more than six employees are now prohibited from asking a job applicant to provide any criminal history information on a written application prior to the interview.[105]

FOUR: The employer community, together with Craigslist, should play a leadership role in raising the profile of this critical issue and promoting best practices that properly balance the mutual interest of workers and employers in fairer and more accurate criminal background checks for employment. Ultimately, it is up to the employer community, the staffing firms, and the background check companies to step up to this national challenge. Like the model government employers described above, most companies should recognize it is in their best interest to not unreasonably limit the applicant pool in order to compete for the best-qualified workers. In turn, by promoting a fairer and open hiring process, they are sending a powerful message that they are committed to the community and diversity.

In addition, Craigslist should accept responsibility for ensuring fair employment practices in this new era when the Internet is the leading source of job postings for millions of unemployed workers. Craigslist could be a leader among online job forums by posting a disclaimer of the type of discriminatory practice described in this report and by publicizing information on its website about the EEOC's standards regulating criminal background checks for employment. The practice has precedent as Craigslist has taken similar steps for its housing ads.[106]

Conclusion

As both the population of people with criminal records and the demand for background checks have grown, enforcement of civil rights and consumer protections for people with criminal records has not kept pace, to the detriment of millions of workers.

Although the Title VII standards provide a fair and effective framework to evaluate criminal records for employment, the problem of unregulated criminal background checks remains endemic. Too often, employers, staffing firms, and screening firms continue to disregard civil rights and consumer protections, categorically banning people with criminal records from employment.

The recent wave of criminal records litigation and public policy advances is encouraging, but leveraging these developments to strengthen worker protections requires bold, new leadership. By taking the critical next steps—which begins by recognizing the scope of this historic national challenge and then adopting the type of corrective measures proposed in this report—millions of deserving workers will have a fairer shot at employment, allowing them to contribute to their communities and help rebuild America's economy.

Endnotes

1 According to a recently published survey of the Society of Human Resources Management—the largest association of human resources personnel—92 percent of their members, which were mostly large employers, perform criminal background checks on some or all job candidates. *See* Society for Human Resources Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010), at 3.

2 NELP based the estimate of U.S. adults with criminal records on the following methodology. According to a 2008 survey of states, there were 92.3 million people with criminal records on file with states, including those individuals fingerprinted for serious misdemeanors and felony arrests. U.S. Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008* (Oct. 2009), at Table 1. In some states, misdemeanor arrests for less serious crimes do not require fingerprinting, thus this figure is likely an undercount of people with criminal records. To account for individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, the 92.3 million figure was reduced by 30 percent (64.6 million). Thus, as a percentage of the U.S. population over the age of 18 (232,458,335 in 2009 according to the U.S. Census Bureau, Population Division, *available at* http://www.census.gov/popest/national/asrh/NC-EST2009-sa.html), an estimated 27.8 percent of the U.S. adult population has a criminal record on file with states. This estimate is consistent with a Department of Justice finding that about "30 percent of the Nation's adult population" has a state rap sheet. U.S. Dept. of Justice Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006), at 51. The rise in people with criminal records may significantly be attributed to the increased arrests associated with the "War on Drugs." *See* Ryan S. King, *Disparity By Geography: The War on Drugs in America's Cities*, The Sentencing Project (May 2008).

3 Employers often perform criminal background checks to limit their potential liability if an employee commits an unlawful act on the job. However, following the EEOC guidance and performing an individualized assessment of the conviction will generally satisfy the legal requirements and eliminate the risk of liability on the employer's part. *See* National H.I.R.E. Network, *Negligent Hiring Concerns*, *available at* http://www.hirenetwork.org/negligent_hiring.html.

4 *See* Brent W. Roberts, *et al.*, *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 Journal of Applied Psychology 1427, 1430 (2007). There is little research examining the correlation between the existence of a criminal record and the propensity to commit crimes at the workplace. However, in this study of New Zealand residents from birth to age 26, researchers found that the existence of a criminal record for 13- to 16-years-old was unrelated to engaging in "counterproductive activities at work" at age 26, including tardiness, absenteeism, disciplinary problems, violence, theft, property destruction, and substance abuse. *Id.* at 1427, 1429–1430.

5 Many people who have a criminal record that shows up on a background check have never been convicted of a crime; in fact, one-third of felony arrests never lead to conviction. U.S. Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties*, 2004 (April 2008).

6 According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state's 54-percent average recidivism rate. American Correctional Assoc., 135thCongress of Correction, *Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study* (August 8, 2005).

7 The U.S. Bureau of Justice Statistics estimates that in 2006, the federal, state and local governments combined spent over $68 billion on corrections; in 1982, that figure was $9 billion. U.S. Bureau of Justice Statistics, *Employment and Expenditure, available at* http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm.

8 The reduction of employment rates of people with felonies and prison records results in a loss of the output of goods and services to the economy. *See* John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, Center for Economic and Policy Research (Nov. 2010), at 14.

9 Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 The Annals of the American Academy, 195, 199 (2009).

10 Commissioner Earp, *Transcript of November 20, 2008 EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records*, at 2.

11 Press Release, *US Department of Labor announces grant competition to help former offenders gain career skills and rejoin community life* (Feb. 10, 2011), *available at* http://www.dol.gov/opa/media/press/eta/ETA20110185.htm.

12 *See* 42 U.S.C. § 2000e et seq., *available at* http://www.eeoc.gov/laws/statutes/titlevii.cfm.

13 *See The U.S. Equal Employment Opportunity Commission, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, Feb. 4, 1987. *See also The U.S. Equal Employment Opportunity Commission, Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 1982*, Sept. 7, 1990. Research has shown that people of color are subject to greater scrutiny and harsher treatment at decision points throughout the criminal justice system. For example, a study showed that drivers of color were stopped by police and searched for contraband at higher rates than whites and another study indicated that people of color charged with felonies were more likely to be detained than whites. The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymaker* (2008) at 2. In a recent study controlling for important legal factors and judicial district, African-Americans and Latinos were found to receive longer sentences than white defendants. Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, Justice Quarterly, 27: 1, 1–27 (2010), at 14.

14 U.S. Dept. of Justice, Federal Bureau of Investigation, *Crime in the United States, 2009*, at Table 43.

15 Blacks account for over 39 million of the U.S. population of 307 million. *See* U.S. Census Bureau, Population Division, Table 3, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2009* (NC-EST2009-03), *available at* http://www.census.gov/popest/national/asrh/NC-EST2009-srh.html.

16 Whites account for 69.1 percent of all arrests in the United States. *See supra* note 14. Whites account for over 244 million of the U.S. population of 307 million (79.6 percent of the population). *See supra* note 15.

17 *The U.S. Equal Employment Opportunity Commission, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, Feb. 4, 1987.

18 *Id*.

19 The researchers calculated the number of years it took for individuals who were arrested for certain felony offenses at 16, 18, and 20 years old to have the same risk of arrest as same-aged non-offenders in the general population. Alfred Blumstein & Kiminori Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, National Institute of Justice Journal, Issue No. 263 (June 2009) at 12-13. *See also* Alfred Blumstein & Kiminori Nakamura, *"Redemption" in the Presence of Widespread Criminal Background Checks*, Criminology, Volume 47, Issue 2: 327–357 (May 2009). In another study, 18-year-olds with criminal records had a substantively similar probability of being arrested as non-offenders after not having contact with the criminal justice system for six to seven years. Megan Kurleychek, Robert Brame & Shawn Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Recidivism?* Criminology and Public Policy, Vol. 5. No.3 (2006).

20 A 20-year-old arrested for robbery had the same risk of arrest as a same-aged non-offender after 4.4 years. Blumstein & Nakamura, *supra* note 19.

21 *See "Redemption" in an Era of Widespread Criminal Background Checks, supra* note 19, at 14.

22 Examples of inaccuracies commonly found in commercially prepared background checks include records being wrongly attributed to individuals, multiple reporting of the same incidents, and uncorrected identity theft. *See* NELP & Community Legal Services of Philadelphia, *Comments to Federal Trade Commission regarding FACTA Notices* (Sept. 20, 2010), *available at* http://www.nelp.org/page/-/SCLP/2010/NELPandCLSFCRANewNoticesComments.pdf?nocdn=1. *See also*, Shawn Bushway, et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?* in *Barriers to Reentry?: The Labor Market for Released Prisoners in Post-Industrial America* (2007) (Based on a survey of on-line providers of criminal background checks, the study finds routine non-compliance with the worker protections of the Fair Credit Reporting Act.) *See e.g., Leonardo Molina v. Roskam Baking Company*, Case No. 09-cv-475 (filed May 26, 2009, W.D. Mich.) at First Amended Complaint. The plaintiff class represented by Lyngklip & Associates, Consumer Law Center, sued the Roskam Baking Company in Michigan. Lead plaintiff, Leonardo Molina, was terminated from his job after a background check erroneously reported a conviction and two charges. Although Molina's record was actually clear, he was not given the opportunity to explain the mistakes on his background report.

23 U.S. Dept. of Justice Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) at 3.

24 *See supra* note 10, Commissioner Ishimaru at 3.

25 *Arroyo v. Accenture*, Case No. 10-civ-3013 (S.D.N.Y., filed April 8, 2010), at Complaint at 1.

26 *Id*. at 7.

27 Netted $21.55 billion in revenue for fiscal year 2010. *Accenture Fact Sheet, available at* http://newsroom.accenture.com/fact+sheet/.

28 *See Hudson v. First Transit, Inc*., Case No. C10-03158 (N.D.Cal., filed July 20, 2010), at Complaint at 1, 2, 4. The class of workers are represented by NELP and the law firms of Goldstein, Demchak, Baller, Borgen & Dardarian and Hughes Socol Piers Resnick & Dym.

29 *Mays v. BNSF*, Case No. 1:10-cv-00153 (N.D. Ill., filed Jan. 11, 2010), at Complaint at 3.

30 E-RAILSAFE, the private screening firm that operates the railroad industry's background checks, has also been the subject of a Congressional inquiry. On February 16, 2007, the U.S. House of Representatives, Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protections held a hearing on the impact of background checks and security clearances on the transportation workforce focused specifically on the e-RAILSAFE program. Written testimony *available at* http://homeland.house.gov/Hearings/index.asp?ID=11&subcommittee=10Subcommittee members. NELP sent a memo on this matter to the House Subcommittee on Transportation Security and Infrastructure Protections, *available at* http://www.nelp.org/page/-/SCLP/2010/Memoone-RailsafeBackgroundChecks.pdf?nocdn=1.

31 *BNSF Factsheet*, *available at* http://www.bnsf.com/about-bnsf/pdf/fact_sheet.pdf.

32 *Johnson, et al. v. Locke*, Case No. 10-cv-3105 (S.D.N.Y., filed April 13, 2010).

33 *Id.* at First Amended Complaint at 2. The U.S. Census "required nearly all job applicants who have ever been arrested to produce within 30 days the 'official court documentation' for any and all of their arrests . . . This requirement eliminated 93 percent of these applicants . . . [L]ess than 5 percent of applicants required to submit official court documentation ultimately were deemed eligible for hire." This policy operated in practice as very nearly a "no arrest or conviction history allowed" policy. Census hired more than one million temporary workers and 3.8 million applied for the temporary work. *Id.* at 1–2. *See also* Plaintiffs' website *available at* http://www.censusdiscriminationlawsuit.com/index.php?option=com_content&view=frontpage&Itemid=1.

34 *Id.* at 1, 26.

35 *EEOC v. Freeman*, Case No. 8:09-cv-02573 (D. Md., filed Sept. 30, 2009). Another suit, *EEOC v. Peoplemark*, Case No. 1:08-cv-907 (W.D. Mich., filed Sept. 29, 2008) was voluntarily dismissed.

36 *See* Press Release, *EEOC Files Nationwide Hiring Discrimination Lawsuit Against Freeman* (Oct. 1, 2009), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-1-09b.cfm.

37 *Id.*

38 There are several EEOC charges filed by workers against large employers across the nation, but because of pending negotiations and settlements, these employers are not named in this report.

39 NELP represents Johnny Magee, profiled in this report, who filed an EEOC charge against Lowe's. Lowe's operates more than 1,725 stores in the United States, Canada and Mexico and has approximately 238,000 employees. *See* Lowe's website, *available at* http://media.lowes.com/company+overview/.

40 NELP represents a client who filed an EEOC charge against Select Truckers Plus, a truck driver staffing company. Select Truckers Plus posted a job announcement on October 28, 2009 listing job requirements as including "No DUI/DWI in previous 5 years[,] No Felony Convictions or time served in the previous 7 years [and] No drug related or violence related misdemeanor Charges." Job ad on file with NELP. *See* Select Truckers Plus website, *available at* http://www.truckersplus.com/main.cfm?nlvl1=1.

41 Bank of America is one of the world's largest financial institutions and reported these figures in June 2010. *See* Bank of America Mid-Year Report 2010 at 6, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjI0Mjd8Q2hpbGRJRDotMXxUeXBlPTM=&t=1.

42 NELP Letter to Acting Chairman Stuart J. Ishimaru, (dated June 9, 2009), *available at* http://nelp.3cdn.net/aa8a86751197fa03ef_z2m6b5abc.pdf.

43 Figures are not specific to the U.S. *See* Manpower website, *available at* http://www.manpower.com/about/about.cfm.

44 *See* New York Correction Law §§ 752-53.

45 RadioShack operates approximately 4,000 stores. *In the Matter of the Investigation of Andrew M. Cuomo, Attorney General of the State of New York, of RadioShack Corporation, Assurance of Discontinuance*, AOD No. 09-148, at 5, *available at* http://www.ag.ny.gov/bureaus/civil_rights/pdfs/Radio%20Shack%20Executed%20AOD.pdf.

46 *Id.*

47 Chad Terhune, *The Trouble With Background Checks*, *Business Week* (May 29, 2008), at 4, *available at* http://www.businessweek.com/magazine/content/08_23/b4087054129334_page_4.htm.

48 *See In the Matter of the Investigation of Andrew M. Cuomo, Attorney General of the State of New York, of ChoicePoint Workplace Solutions Inc., et al., Assurance of Discontinuance*, AOD No. 09-165, at 6, *available at* http://www.ag.ny.gov/bureaus/civil_rights/pdfs/ChoicePoint%20AOD.pdf.

49 *Id. See also* New York Executive Law §§ 296 (15), (16); New York Correction Law §§ 752-53.

50 *See In the Matter of the Investigation of Andrew M. Cuomo, Attorney General of the State of New York, of ABM Industries Inc., Assurance of Discontinuance*, AOD No. 10-173, at 4.

51 *Id.* at 5.

52 *See In the Matter of the Investigation of Andrew M. Cuomo, Attorney General of the State of New York, of Aramark Corporation, Assurance of Discontinuance*, AOD No. 09-164, at 5.

53 *See supra* notes 45, 48, 50, and 52.

54 15 U.S.C. § 1681b(b)(3).

55 *See* Bushway, *et al., supra* note 22.

56 *See Williams v. Prologistix*, Case No. 1:10-cv-00956 (N.D. Ill., filed Feb. 11, 2010); *Smith v. HireRight Solutions, et al.*, Case No. 4:10-cv-444 (N.D. Okla., filed July 7, 2010); *Henderson v. HireRight Solutions, et al.*, Case No. 10-cv-443 (N.D. Okla., filed July 7, 2010); *Hunter v. First Transit*, Case No. 1:09-cv-06178 (N.D. Ill.; filed Oct. 5, 2009); *Joshaway v. First Student*, Case No. 2:09-cv-02244 (C.D. Ill., filed Oct. 5, 2009); *Ryals v. HireRight Solutions, et al.* Case No. 3:09-cv-00625-RLW (E.D. Va., filed Oct. 5, 2009).

57 *See id.; see also Williams v. LexisNexis Risk Mgmt.,* Case No. 3:06cv241 (E.D. Va., filed April 10, 2006).

58 The two lawsuits produced settlements requiring civil penalties of $53,000 and $24,000, respectively. See Press Release, *Two Companies Pay Civil Penalties to Settle FTC Charges; Failed to Give Required Notices to Fired Workers and Rejected Job Applicants* (Aug. 11, 2009), *available at* http://www.ftc.gov/opa/2009/08/qts.shtm.

59 Cities, counties, or areas listed in the United States are *available at* http://www.craigslist.org/about/sites#US. Craigslist Factsheet, *available at* http://www.craigslist.org/about/factsheet.

60 NELP's survey focused on five low-wage and/or low-skill industries in five major cities across the United States. The job categories surveyed on Craigslist included: (1) Customer Service; (2) Food/Beverage/Hospitality; (3) Manufacturing; (4) Retail/Wholesale; and (5) Skilled Trade/Craft. *See e.g.*, Craigslist website for list of job categories, *available at* http://sfbay.craigslist.org/.The five major cities were the San Francisco Bay Area, Los Angeles, Chicago, New York City, and Atlanta. Sampling four random month-long time periods during 2010, the survey found over 2500 job ads that referenced a criminal background check requirement. Among these approximately 2500 ads, over 300 included the most overt and problematic type of screening criteria featured in this report. (Job ads on file with NELP.) If this survey were expanded to include all U.S. geographic areas where Craigslist operates and all the listed occupations over a more extended time period, there would certainly be thousands of postings by employers and staffing firms communicating blanket policies against hiring people with criminal records. Further, these findings do not take into account that many employers have such policies in place but do not communicate their hiring restrictions in their job postings. Thus, the results of this survey represent just the tip of the iceberg among the thousands of employers each year that have a blatant—even documented in writing—blanket, no-hire policy.

61 *See* EEOC Arrest Record Guidance, *supra* note 13.

62 *See supra* note 1, at 5.

63 OMNI Energy Services Corp. specializes in providing services and rental equipment to geophysical companies and offshore operations. In 2009, the total revenue was $122.4 million and they have approximately 625 employees. *See* OMNI Energy Services Corp. website, *available at* http://www.omnienergy.com/uploads/AnnualReport2009.pdf.

64 *See* EEOC Arrest Record Guidance, *supra* note 13.

65 This is because it "is generally presumed that an employer only asks questions which he/she deems relevant to the employment decision." *See id.*

66 As noted in the EEOC Arrest Record Guidance, *see id.*, numerous states have either prohibited or advised against pre-employment inquiries regarding arrest information, including New York, Hawaii, Oregon, Wisconsin, New Jersey, Ohio, Virginia, District of Columbia, California, Maryland, Minnesota, Utah, Washington, West Virginia, Arizona, Colorado, Idaho, Massachusetts, Michigan, and Mississippi.

67 *See id.*

68 CORT is the world's largest provider of rental furniture and has more than 2,000 employees. *See* CORT rental furniture website, *available at* http://www.cort.com/about-cort.

69 Fiscal year 2010 indicated $7.4 billion in revenue and a workforce of more than 67,000; however, these figures are not U.S. specific. *See* FedEx Ground Facts, *available at* http://about.fedex.designcdt.com/our_company/company_information/fedex_ground.

70 Corinthian International Parking Services Inc. is a full-service parking management company employing more than 400 people from San Jose to Sacramento. *See* Corinthian International Parking Services website, *available at* http://www.corinthianparking.com/home.html.

71 Luskin-Clark Service Company is a provider of plumbing, heating, air conditioning, electrical and home improvement in Los Angeles County. *See* Luskin-Clark Service company website, *available at* http://www.luskinservicecompany.com/. The website LinkedIn indicated that there were approximately 100 employees, *available at* http://www.linkedin.com/companies/luskin--clark-service-company.

72 This example is based on one discussed in the EEOC guidance to illustrate the evaluation of records. *See* EEOC Arrest Record Guidance, *supra* note 13, at *Example 2*.

73 Domino's Pizza has nearly 600 corporate-owned stores and a system of more than 5,000 domestic franchise-owned stores; the company has approximately 170,000 employees worldwide. *See* Domino's Pizza Financial Tearsheet, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=135383&p=tearsheet.

74 Omni Hotels has 45 luxury hotels and resorts across North America and 11,000 employees. *See* Omni Hotels website, *available at* http://www.omnihotels.com/AboutOmniHotels/OmniHotels.aspx. The ad was for Omni Los Angeles.

75 Altaquip is a service company for powered equipment and tool repairs and has 27 locations. The website for the company does not list the number of employees. *See* Altaquip website, *available at* http://www.altaquip.com/About-Us/CareerOpportunities.aspx. One website reported that Altaquip has 500 employees. *See* http://www.insideview.com/directory/altaquip-llc.

76 Adecco USA is a recruiting and staffing company. *See* Adecco USA website, *available at* http://www.adeccousa.com/Pages/Welcome.aspx.

77 *See* Blumstein & Nakamura, *supra* note 19.

78 *See* Enforcement Guidance: *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at Question 7 (Dec. 1997), *available at* http://www.eeoc.gov/policy/docs/conting.html. *See also* 42 U.S.C. § 2000e-2.

79 Perimeter Staffing is a staffing agency based in Atlanta. *See* Perimeter Staffing website, *available at* http://www.perimeterstaffing.com/.

80 Carlisle Staffing, Ltd. is a temporary, temp-to-hire and direct hire staffing agency in the Chicago-land area and suburbs. *See* Carlisle Staffing, Ltd. website, *available at* http://www.carlislestaffing.com/pdfs/Carlisle%20Staffing%20Summary%20of%20Services.pdf.

81 Abbott Staffing Group serves the Orange County, Los Angeles and the Inland Empire. *See* Abbott Staffing Group website, *available at* http://www.abigailabbott.com/Home.aspx.

82 Crown Services Inc. is a staffing firm operating in 9 Midwestern states with more than 35 offices. *See* Crown Services Inc. website, *available at* http://www.crownservices.com/about.html.

83 Peak Organization is a staffing firm in New York City. *See* Peak Organization website, *available at* http://www.peakorg.com/index.html.

84 *See* Federal Procurement Data System - Next Generation Top 100 Contractors Report (2009), *available at* https://www.fpds.gov/fpdsng_cms/index.php/reports.

85 These companies were identified as having contracts with the federal government through the online database the Federal Procurement Data System – Next Generation (FPDS-NG). FPDS-NG data provides details on the procurement activities of more than 60 federal departments, *available at* https://www.fpds.gov/fpdsng_cms/index.php.

86 Executive Order 11246 prohibits federal contractors and federally-assisted construction contractors and subcontractors who have over $10,000 in government business (in one year) from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. *See Facts on Executive Order 11246—Affirmative Action* (Jan. 4, 2002), *available at* http://www.dol.gov/ofccp/regs/compliance/aa.htm.

87 Press Release, *Attorney General Eric Holder Convenes Inaugural Cabinet-Level Reentry Council* (Jan. 5, 2011), *available at* http://www.justice.gov/opa/pr/2011/January/11-ag-010.html.

88 Press Release, *Mayoral Task Force Releases Recommendations on Prisoner Reentry*, (Jan. 24, 2006), *available at* http://www.chicagometropolis2020.org/documents/prisonerreentrypressrelease.pdf. *See also Breaking The Cycle of Incarceration and Building Brighter Futures In Chicago: Final Report of The Mayoral Policy Caucus on Prisoner Reentry* (Jan. 2006).

89 A "federal contractor" includes companies that provide goods or services to a federal agency, receives federal funds for a construction project, or provides goods or services to another company that supplies a federal agency or receives construction funds. U.S. Dept. of Labor, OFCCP, *New Contractors' Guide* (Aug. 2009) at 4, *available at* http://www.dol.gov/ofccp/TAguides/New_Contractors_Guide.pdf.

90 "Nearly one in four American workers is employed by an establishment that receives federal funds for contracted work. That's nearly 200,000 businesses with contracts totaling almost $700 billion." Keynote Address by Patricia A. Shiu, Director of the Office of Federal Contract Compliance Programs at the U.S. Dept. of Labor (Sept. 30, 2010), *available at* http://www.dol.gov/ofccp/addresses/Hard_Hatted_Women.htm.

91 *See* NELP Presentation to EEOC, *Criminal Background Checks for Employment: Promoting Model Federal Hiring & Contractor Policies that Protect Civil Rights & Public Safety* (April 21, 2010), *available at* http://www.nelp.org/page/-/SCLP/2010/PresentationNationalEEO.pdf?nocdn=1.

92 Currently, federal government hiring is proscribed by "suitability" standards established by the Office of Personnel Management (5 C.F.R. part 731), which provides individual federal agencies with guidelines and discretion to adopt their own criminal background check policies and procedures. In addition, federal employers are regulated by Title VII and by post 9/11 security procedures (Homeland Security Presidential Directive/HSPD-12) requiring a criminal background check on anyone who works on a regular basis on federal premises. *Homeland Security Presidential Directive/HSPD–12—Policy for a Common Identification Standard for Federal Employees and Contractors*, Public Papers of the President, George W. Bush, Vol. 2, Aug. 27, 2007, p. 1765 (2007). *See also NASA, et al., v. Nelson, et al.*, 131 S. Ct. 746

(2011) for discussion of federal employer security procedures. Opinion *available at* http://www.supremecourt.gov/opinions/10pdf/09-530.pdf. Within broad guidelines established by the Office of Management and Budget, each federal agency also establishes its own screening standards and protections that apply to their contractors.

93 *See* NELP Presentation at National EEO Directors' Meeting (April 2010), at 8–10, *available at* http://www.nelp.org/page/-/SCLP/2010/PresentationNationalEEO.pdf?nocdn=1. In fact, the federal government's Office of Personnel Management regulation states, "[b]ecause suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost-effective to first ensure that the applicant is eligible for the position." 7 C.F.R. § 731.103.

94 *See* National League of Cities & NELP, *Cities Pave the Way: Promising Reentry Policies that Promote Local Hiring of People with Criminal Records*, (July 2010) at Appendix, *available at* http://www.nelp.org/page/-/SCLP/2010/ CitiesPavetheWay.pdf?nocdn=1 (hereinafter Cities Pave the Way); *see also* NELP, *New State Initiatives Adopt Model Hiring Policies Reducing Barriers to Employment of People with Criminal Record* (Sept. 2010), *available at* http://www.nelp.org/ page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1 (hereinafter *State Initiatives*).

95 5 C.F.R. §731.301.

96 The growing numbers of designated "exempt" workers employed by the federal government now exceeds the number of workers classified as "civil service" workers. Compared to civil service employees, the federal agencies that employ "exempt" workers are not bound by the OPM's procedural protections that apply to criminal background checks for employment.

97 The FBI should work with federal agencies and contractors to improve the accuracy of the FBI rap sheets that are generated in response to criminal background check requests. As documented by the U.S. Attorney General, 50 percent of these records are incomplete because the states fail to regularly update the arrest information submitted to the FBI. *See supra* note 23. As a result, the entire burden of correcting the records falls on the workers, which significantly delays the hiring process and has a disparate impact on workers of color. *See* NELP, *A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession* (July 2009), *available at* http://nelp.3cdn.net/0714d0826f3ecf7a15_70m6i6fwb.pdf (hereinafter *A Scorecard*). As proposed by the Fair and Accurate Criminal Background Checks Act (H.R. 5300), the FBI should update these records before they are released to the federal agencies. *See* NELP, *Fairness & Accuracy in Employment Background Checks Act (H.R. 5300) Factsheet, available at* http://nelp.3cdn.net/2458609645a577413b_dum6ii6rb.pdf.

98 *See* 46 U.S.C. §70105.

99 *See A Scorecard*, *supra* note 97.

100 *See* NELP Presentation to EEOC, *Federal Hiring & Contractor Policies that Protect Civil Rights & Public Safety* (April 21, 2010), *available at* http://www.nelp.org/page/-/SCLP/2010/PresentationNationalEEO.pdf?nocdn=1.

101 *See supra* note 45, at 8–13.

102 *See Cities Pave the Way*, *supra* note 94.

103 Cities that require vendors to adhere to fair hiring policies include: Boston, MA; Cambridge, MA; Worchester, MA; New Haven, CT; and Hartford, CT; and Battle Creek, MI. *See id.*, at Appendix.

104 Massachusetts, Wisconsin, Hawaii, Pennsylvania, and New York require private employers to adhere to various fair hiring measures. *See State Initiatives*, *supra* note 94.

105 *See* FactSheet distributed by the Massachusetts Commission Against Discrimination (MCAD), *available at* http://www.mass.gov/mcad/documents/Criminal%20Records%20Fact%20Sheet.pdf.

106 The Craigslist disclaimer in the housing context indicates that "stating a discriminatory preference in a housing post is illegal" and provides a link to a factsheet describing basic information about the Fair Housing Act, *available at* http://sfbay.craigslist.org/about/FHA.

107 Order for Release from Penalties and Dismissal Under P.C. 1203.4 (filed July 22, 2008).

108 *See* NELP Press Release (dated Nov. 20, 2008), *available at* http://www.nelp.org/page/-/SCLP/MaGeeEEOCRelease.pdf.

109 *See* Dawn Turner Trice, *CPS: Good Conduct certificate not good enough*, Chicago Times (July 29, 2010), *available at* http://articles.chicagotribune.com/2010-07-29/news/ct-met-trice-cps-0728-20100728_1_cps-boiler-room-second-chance; Dawn Turner Trice, *CPS reverses itself, gives job candidate a 2nd chance: Worker was haunted by 25-year-old conviction*, Chicago Times (Sept. 26, 2010), *available at* http://articles.chicagotribune.com/2010-09-26/news/ct-met-trice-langdon-0926-20100926_1_cps-for-four-years-darrell-langdon-cps-spokeswoman-monique-bond.

110 *See Arcadia Murillo v. City of Chicago and Triad Consulting Services, Inc.*, Case No. 10CH36826 (Cir. Ct. Cook County, filed Aug. 25, 2010). Plaintiff is represented by Hughes Socol Piers Resnick & Dym.

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